Supreme Court, U.S.
FILED
DEC 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-312

IN THE

Supreme Court of The United States

OCTOBER TERM, 1989

SYRACUSE PEACE COUNCIL, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF PETITIONERS

Andrew Jay Schwartzman*
Gigi B. Sohn
MEDIA ACCESS PROJECT
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300

Counsel for Petitioner
Syracuse Peace Council

*Counsel of Record

CASILLAS PRESS, INC., 1717 K STREET, WASHINGTON, D.C. 20036

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

ADMINISTRATIVE:

Commercial TV Stations,
98 FCC 2d 1076 (1984) 5

Deregulation of Radio, 84 FCC 2d 968,
recon. denied, 87 FCC 2d 797 (1981),
rev'd in part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413
(D.C. Cir. 1983) 5

Fairness Doctrine Inquiry, 74 FCC 2d 163 (1979) 4

In re Obligations of Licensees under the Fairness Doctrine,
23 FCC 2d 27 (1970) 4

Letter to Oren Harris, 40 FCC 582 (1963) 4

1985 Fairness Report, 102 FCC 2d 143 (1985) 6

Report and Order (Teletext), 53 Rad. Reg. 1309 (1983) 4

JUDICIAL:

Maier v. FCC, 735 F.2d 220 (7th Cir. 1984) 3, 4

Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241 (1974) 4, 5

Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1983) 5, 6

Public Interest Research Group v. FCC, 522 F.2d 1060
(1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) 4

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 3, 5, 7

Page

Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1987), *reh'g en banc denied*, 806 F.2d 1115, *cert. denied*, 482 U.S. 919 (1987).....2, 3, 4

MISCELLANEOUS:

Broadcasting Mag., December 28, 1987.....2

The Washington Post, Nov. 22, 1989.....2

IN THE

Supreme Court of The United States

OCTOBER TERM, 1989

No. 89-312

SYRACUSE PEACE COUNCIL, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF PETITIONERS

ARGUMENT

The Federal respondents have not answered petitioners' main argument — that the statutory scheme makes the broadcaster the public fiduciary for those kept off the scarce frequency by the Government and thus embodies the concept of the fairness doctrine. The respondents have also not answered our point that the decision below is based squarely on the applicability of the print model to the public interest standard of the Communications Act. They do not dispute that under the new policy, even the only broadcast station in a community can become a propaganda outlet for a single viewpoint,

serving only private and not *public* interests. An issue of such great importance to the nation should be decided now by this Court rather than put off in the slim hope that legislation may be enacted at some future time.

1. Respondents' suggestion (Br. at 13), that this Court should not pass on this most important issue because legislation will be enacted to deal with the issue, is undermined by the actual legislative record. In the 100th Congress, Congress did pass such legislation only to see it vetoed by the President (see Pet. at n.25); despite strong majorities, there evidently were not enough votes to override the veto. Instead, therefore, supporters sought to insert fairness legislation in a veto-proof bill, the end-of-the-session appropriations measure. However, they had to retreat because a Presidential veto was nonetheless threatened.[1] The current Congress certainly has the votes to reenact such legislation, but again faces a possible veto; it has therefore followed a similar strategy, placing the measure in the House-passed budget reconciliation bill. Again, however, the effort has failed.[2] The actual legislative pattern, persisting over several sessions, is thus one of stalemate between the Congress and the Executive Branch. In view of this pattern, legislation is possible but must be adjudged unlikely. The important issue that we have presented could thus well remain unresolved for years or indefinitely unless this Court acts now on the petition before it.[3]

---

[1]*See Broadcasting Mag.*, December 28, 1987, at 31-32.

[2]*See The Washington Post*, Nov. 22, 1989, at A10.

[3]Significantly, in May 1987, *over two and one-half years ago*, the Federal respondents similarly relied upon the pendency of legislation to oppose the petition for writ of *certiorari* in *Telecommunications Research and Action Center* v. *FCC*, 801 F.2d 501 (D.C. Cir. 1987), *reh'g en banc denied*, 806 F.2d 1115, *cert. denied*, 482 U.S. 919 (1987)(herein *TRAC*). See Br. for the Fed. Respondents in Opp., in Case No. 86-1371, Oct. Term, 1986, at 15.

2. Our petition set out the statutory scheme illumined in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) — the need for Government licensing because many more wanted to broadcast than there are available channels; the Government's decision not to divide the broadcast day or week among many but to put one entity on the channel as a short term licensee obligated to serve as a fiduciary for those kept off by the Government; and thus that "it is the rights of the viewers or listeners, not the broadcasters, which are paramount." *Id.*, 395 U.S. at 391. We pointed out (Pet. at 12) that neither the court below, in relying on *TRAC* as the law of the circuit, nor the Commission, had taken into account this crucial statutory scheme, which mandates some form of fairness — that rather than just the views favored by the licensee, contrasting views be afforded the opportunity to be heard. The respondents' brief (pp. 17-19) still does not address that scheme. We again strongly assert that the fairness concept inheres in the public interest standard — in the holding in *Red Lion* that under the statutory scheme the broadcaster is a public fiduciary for its community.[4] That is why the 1959 Amendment to Section 315 reads as it does — "...the obligation imposed upon [broadcasters] under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The 1959 amendment was thus simply reiterating what already inheres in the public interest standard, as the cited legislative history explicitly establishes (Pet. at 17).

The *TRAC* case stands alone in holding that fairness is not a statutory requirement. Significantly, that case emerged from a closely divided panel and full court (see Pet., at 16, n.22),

---

[4]*See Maier* v. *FCC*, 735 F.2d 220, 226 (7th Cir. 1984) (herein *Maier*): "A broadcaster's compliance with the fairness doctrine is at the core of this 'public interest' standard."

but the opinion never discusses the public trustee scheme or standard.[5] The respondents err (Br. 14-15) in relying upon *Public Interest Research Group* v. *FCC*, 522 F.2d 1060, 1066-67 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976).[6] And what the respondents dismiss (Br. at 14, n.10) as a "passing reference" in *Maier, supra*, was a square holding that fairness has a statutory basis.[7]

3. Respondents reject (Br. at 19) our assertion that the case presents a choice between the "public trustee concept" and a print model for the regulation of broadcasting. But to do so, they are forced to ignore the holding of the court below, even though quoted at length in our petition (at 14-15). *The court below, specifically relying upon* Miami Herald Publishing Co. *v.* Tornillo, 418 U.S. 241 (1974) *and this Court's "finding of similar value judgments implicit in the First Amendment as applied to the print media...," sustained the Commission on one*

---

[5]The issue was never briefed or argued orally to the court in *TRAC*. The FCC decision affirmed by the *TRAC* panel held only that "the 1959 legislative enactment concerning the Fairness Doctrine in Section 315 does not mandate extension...to new services like teletext, which did not even exist at the time when Congress acted." *Report and Order (Teletext)*, 53 Rad. Reg. 1309, 1323 (1983). The decision never addressed the public interest standard at all. For more than 20 years, the FCC repeatedly accepted the doctrine as statutorily required. See, *e.g.*, *Fairness Doctrine Inquiry*, 74 FCC2d 163, 178 (1979); *In re Obligations of Licensees under the Fairness Doctrine*, 23 FCC2d 27, 28 (1970); *Letter to Oren Harris*, 40 FCC 582, 583 (1963).

[6]The court there rejected the argument that Congress mandated "both the fairness doctrine and the Commission's application of it to product ads," holding that the 1959 amendment does not reach product ads since "Congress left questions of application and accommodation to the Commission." *Id.*, 735 F.2d at 1066-67.

[7]*See Maier, supra*, 735 F.2d at 225-26, n.5, where the majority, in responding to the dissent, held that the 1959 amendment constitutes a "statutory basis" for reviewing agency fairness rulings, rather than one simply "committed to agency discretion by law."

ground alone: that the Commission could similarly discount the value of speech generated by the fairness doctrine as "governmentally coerced speech." App. 25a. The court below thus held that as a matter of policy, the Commission is free to construe the public interest standard in accord with *Tornillo*, the print model where the rights of the speaker (publisher) are paramount, rather than as laid down in *Red Lion*, the public fiduciary model where the rights of the listeners or viewers are paramount. So construed, the FCC is not only free but should act to wipe out the agency requirements under the public interest standard to present children's television programming or community issue-oriented programs, since such fare is also "governmentally coerced speech" and contrary to the policy applied to the print media.

4. Respondents are obviously much embarrassed by our point (Pet. at 12-15) that under the new policy, Lamar Life Broadcasting Co., the licensee in *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) (herein *UCC*), would now be renewed as serving the *public* interest even though it would only present the segregationist viewpoint on the issue of integration in Jackson, Miss. They assert (Br. at 20, n.12) that under FCC rulings, "broadcasters cannot engage in intentional [racial] discrimination in the selection of the issues to be addressed in their programming." But the rulings cited (i) deal with the matter of community issue-oriented programming; (ii) were issued *before* the FCC's determination to eliminate the doctrine; and (iii) are ***premised upon the existence of the doctrine.***[8]

[8]Thus, in the cited decision in *Deregulation of Radio*, 84 FCC2d 968, 979, *recon. denied*, 87 FCC2d 797 (1981), *rev'd in part sub nom. Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983), the Commission said that "we expect adherence to the Fairness Doctrine" See also *id.*, 84 FCC2d at 980-82; *Commercial TV Stations*, 98 FCC2d 1076, 1095, n.63 (1984).

Even more inexplicable is the fact that the case relied upon by the Commission, "*LaMar Life Broadcasting Co.*" (*sic*) is the very same fairness case in which the court (per then Judge Burger) later reversed the FCC, holding that compliance with the fairness doctrine is the "*sine qua non*" of every broadcast licensee if it is to obtain renewal. *UCC*, *supra*, 359 F.2d at 1009.

We strongly advanced this same argument based on *UCC* to the FCC in both the 1985 and 1987 proceedings on the fairness doctrine. The agency did not answer as its counsel does now — that the *UCC* situation will still be handled under prior rulings. On the contrary, the *UCC* case is mentioned only in the 1985 Report, where the agency incredibly cites it for the proposition that the Government was chilling "abhorrent or extreme" opinion. See *1985 Fairness Report*, 102 FCC2d 143, 227, n.169(1985)(App.123a). Counsel is thus impermissibly trying to shift the basis of the agency's action.

This is further shown by analysis of counsel's argument. With the fairness doctrine eliminated, broadcasters are free to present only one side of an issue, rather than being required to afford reasonable opportunity for contrasting views. Respondents cannot seriously argue that the Commission will nevertheless examine whether the broadcaster's decision to cover only one side is "intentional" discrimination and therefore subject to governmental remedial action. Such an examination into mental processes would be a First Amendment horror, and in any event makes no sense: The FCC would have eliminated the fairness doctrine only to substitute another doctrine (no intentional discrimination in the coverage of issues) which would even more severely impinge upon the broadcaster's discretion. Finally, and most significantly on this point, respondents do not dispute our point (Pet., at 13) that with the elimination of the doctrine, broadcasters can now

become proselytizing organs, presenting only the viewpoints with which they agree or for which they receive payments. But see *Red Lion, supra*, 395 U.S. at 392.[9]

[9]Respondents defend (Br. at 21-22) the Commission's elimination of the first prong of the doctrine — the duty to present controversial issues — on two grounds. We have already dealt with the ground upon which the court below sustained the Commission (see Pet., at 21-22). We simply point out here that the other ground recited by the Commission — the requirement is duplicative of an existing obligation to present community issue oriented programming — was rejected by two of the three judges below, and acknowledged to be in error by the agency itself. See n.34, Pet.; ***Memorandum Opinion and Order on Reconsideration***, at App.304a.

CONCLUSION

It is incorrect for respondents to argue that only some "narrow" issue is presented by the petition. Broadcasting, especially television, is the primary medium upon which the American people rely in informing themselves on issues to be determined through the democratic process. The decision of the Commission, as affirmed by the court below, profoundly affects the broadcast process in this vital respect. We therefore urge the Court to grant the petition and rule on whether the broadcaster remains a public fiduciary or is free to act in its private interest on the scarce channel or frequency bestowed upon by it by the Government (with all others excluded by the Government).

Respectfully submitted,

Angela J. Campbell
Georgetown University Law Center
Institute for Public Representation
25 E Street, N.W.
Washington, D.C. 20001
Counsel for Petitioner Office of Communication of the United Church of Christ

Andrew Jay Schwartzman*
Gigi B. Sohn
MEDIA ACCESS PROJECT
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300
Counsel for Petitioner Syracuse Peace Council

Charles Ferris
Bruce Sokler
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo
Suite 1201
1825 Eye Street, N.W.
Washington, D.C. 20006
Counsel for Intervenors Democractic National Committee, *et al.*

Henry Geller
Donna Lampert
3001 Veazey Terrace, NW
Washington, D.C. 20008
(202) 362-0005
Counsel for Petitioners Geller and Lampert

*Counsel of Record

December 1989